ORIGINAL

20030312

SUPREME COURT CASE NUMBER 20030312

NORTH DAKOTA SUPREME COURT

STATE V.MATHRE

APPEAL FROM CRIMINAL JUDGMENT

DATED FEBRUARY 23,2004

WITH THE DISTRICT COURT,

NORTWEST JUDICIAL DISTRICT

HONORABLE WILLIAM MCLEES, JUDGE

BRIEF OF DEFENDANT/APPELLANT

Larry Shane Mathre,
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court No. 20030312
Mark Flagstad	)	Criminal No. 03-k-0854
Plaintiff-Apellee	)	Criminal No. 03-k-0236/001
	)	002
v.	)	003
	)	004
	)	
Larry Shane Mathre	)	
D.O.B. 11-16-65	)	
SSN: 516-76-3451	)	
	)	
Defendant-Appellant		

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STATEMENT OF THE CASE

Larry Shane Mathre (hereafter referred to as Mathre), The Defendant and Appellant, appeals from a criminal judgment convicting him of assaulting a police officer, (two counts), preventing arrest or discharge of other duties and escape on or about 31 January, 2003. The Pre-trial conference was held on July 18th, 2003. A jury trial was held on October 2, 2003 on the charges of Assault on a police officer, Assault on a police officer, resisting arrest, and escape. Mathre was convicted of all charges. The criminal judgment was entered on

December 15, 2003. Mathre originally filed his notice of appeal October 29, 2003, and the appeal was stayed till December 16th .

STATEMENT OF THE FACTS

On January 31st, Mathre was initially placed under arrest for violation of Minot City ordinance No. 2455,ss. 5. According to Prosecution witnesses, Law enforcement was called to the residence at 104 8th street S.E. for an unwanted individual at that address, and assistance to remove the individual was needed.

Upon the arrival of the prosecutions witnesses, officers of the Minot Police Department saw several people attempting to remove furniture and items of a personal nature from the apartment located there. Helen B. Hancock was renting the apartment. Mrs. Helen B. Hancock is the grandmother of Mathre and was being moved to Mathre' residence. Officer Effertz testified that there was an internal police memo that stated Mathre had caused trouble at that location previously.

Mathre as well as the witnesses for the defense, including Mathre's Grandmother, did not know of any problems or trouble concerning Mathre at that property, and could not testify to any wrongdoing of Mathre. This is because there had been no problems with Mathre at the residence. According to witnesses for the prosecution and the defense, Mathre was seen on only the public street and sidewalk, at no point and time was he on the private property. Mathre pulled his pants down exposing his buttocks and slapped them in the direction of the police officers. Mathre yelled something at the Law Enforcement officers, but according to their testimony, they were in police cars with the windows rolled

up and did not hear what was said. Mathre per testimony of the prosecution and the defense, went back to work loading the van and trailer and disappeared on the south side of the trailer. Mathre was then approached by Minot City police officers Corwin Effertz and Scot Redding.

According to their (Effertz and Redding) testimony they concurred that this behavior (mooning) constituted the crime of disorderly conduct. Officer Effertz and Officer Redding both testified that they did not see Mathre's anus, nor his penis, and for obvious reasons Mathre's vulva. According to direct testimony on rebuttal, Officer Effertz first words stated to Mathre were "Shane, you were warned not to be here!" as officer Redding attempted to apprehend Mathre. "Shane" is Mathre's middle name and is what friends and family call him. Officer Effertz initial statements while Officer Redding grabbed Mathre were made concerning apparent trespass and causing "trouble" at the residence, not any statements pertaining to any disorderly conduct. Others assisting in the move of Helen B. Hancock as well as Mathre, confronted the Minot police with the fact that Mathre was not on the private property and that he was only on the public sidewalk and public street.

The police officers then informed Mathre he was under arrest for disorderly conduct. When confronted with this and Mathre asked "for what?" The Minot police officers responded for the "mooning" thing. Mr. Mathre responded that according to the North Carolina Supreme Court, "Flye v North Carolina ", that mooning was a constitutionally protected expression under first amendment freedoms and was not illegal. The officers responded with this is North Dakota and not North

Carolina and proceeded to place Mathre under arrest for disorderly conduct.

Mathre resigned to the arrest and witnesses at the scene told Mathre they would get him out of jail. Mathre stated he had enough money in his wallet to make bail "before the cops get done with their paperwork". Law enforcement didn't appreciate Mathres comments or moving around and proceeded to tell him to get up against the trailer, and despite Mathres argument that he had not broken any laws, they continued to slam him against the trailer. Mathre had occasion to look down to see his cellular phone in the snow and the officers stepping on it. Mathre requested that they quit stepping on it. His request went unhearalded and Mathre pushed himself away from the trailer in the direction of the minivan. Mathre was arrested in the front of the trailer which was backed in at a 90 degree angle, so the step back placed him equally distant from the mini-van and the trailer. Approximately 3 feet. With this, per testimony of Law enforcement, they began to try to kick Mathre legs out from under him and restrain him with wrestling moves including "body blocks and ½ nelsons". At this point and time Mathre heard someone yell loudly " Helen". Mathre looked to see his 77 year old grandmother collapse in a snow bank. Mathre yelled out that he was a Nurse and an EMT and when the officers continued to restrain him, Mathre then pushed Officers Redding and Effertz out of the way to get to his Grandmother, using only as much force as needed. The law enforcement office gave chase of the approximately 12 feet Mathre ran to assist his grandmother and tackled him there. Mathre continued to fight to get free, continuing to yell that he was a nurse. Only after Mathre was subdued did law enforcement radio for an ambulance.

LAW AND ARGUMENT

Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted §§ 29-28-03 and 29-28-06 which provide as follows:

§ 29-28-03. "Appeals as a matter of right. An appeal to the supreme court provided for in this chapter may be taken as a matter of right."

§ 29-28-03. "From what defendant may appeal. An appeal may be taken by The Defendant from:

1. A verdict of guilty;

2. An order made after judgment affecting any substantial right of the party."

I. State v. Lewis, 291 N.W.2d 735 (N.D. 1980) [2]. The Defendants right to an appeal was reiterated by the North Dakota Supreme Court in State v. Vondal, 1998 ND 188, 585 N.W.2d 129. Mathre appeals from the District Court's judgments convicting him of the charges of Preventing arrest or discharge of other duties, Assault on a police officer (2 counts) and Escape. As a matter of law, Mathre's appeal from these convictions is permissible.

The Defense contends that the initial arrest of Mathre was not legal, under color of the law, and was a violation of Mathre's constitutional rights under the first amendment as to freedom of speech and expression. That Law enforcement used excessive force for which mathre defended himself and his property. And then as a final act Mathre escaped to assist his grandmother who had collapsed into the snow. Any injuries sustained by Law enforcement officers were not

willfull, and resulted in their own illegal activities.

On January 31, 2003, Mathre ("Mathre") was charged with having committed the offense of DISORDERLY CONDUCT, a Class B Misdemeanor, in violation of Section 23-16 of Minot City Ordinance No. 2455ss5, which reads, in pertinent part, as follows:

No person shall with intent to harass, annoy or alarm another person, or in reckless disregard of the fact that another person is harassed, annoyed or alarmed by his behavior:

(4) In a public place, use abusive or obscene language, or make an obscene gesture.

Mathre subsequently entered a plea of "not guilty" to the charge in the Minot Municipal Court. This case was tried to the Court (Hon. Mark B. Rasmuson) on March 26, 2003, and the Court entered a finding of "guilty" as charged. After the Court announced its decision, Mathre informed the Court that he intended to appeal to the Ward County District Court for a trial de novo. Mathre then appealed to District court, County of Ward, and was found "not guilty".

The Court, sitting without a jury on Wednesday, August 13, 2003, beginning at 1:30 p.m., C.D.T., in courtroom 100, at the Ward County Courthouse, Minot North Dakota, heard the appeal. Assistant Ward County State's Attorney Kelly A. Dillon represented the City of Minot, while Mathre presented his case pro se. The court heard testimony from the following witnesses: Corwin Effertz; Scott Redding; and Mathre.

The Minot Police Department were at the scene to remove Mathre from a "public sidewalk" and a "public street" These were in front of a house ran by the Department of Social Services, and is known as the "transitional housing unit" Mathre was definitely wanted at the premises since he had the mini-van and the U-haul trailer being used to move Mrs. Hancock's possessions as well as Mrs. Hancock. Mathre stood on the sidewalk and loaded the vehicles while female friends of Mrs. Hancock's brought the furnishings and items out to him to load.

Again Mathre, according to both the defenses and the states witnesses was never on the private property. Andy Desjarlais was also on the public sidewalk and Public Street as well. Mr. Desjarlais was not approached and told he was warned not to be there. Also according to Prosecutions witness Kim Potter, the responsible party for transitional housing, stated that neither she nor anyone from her agency had personally "warned" Mathre to not be there. In court the State argued that the Department of Social Services (hereafter referred to as the SS) could warn Mathre not to be on public property and that they could intercede in his assisting to move his grandmother. And according to their testimony they were there to remove Mathre. Only after being told that Mathre had not broken any laws by bystanders was Mathre arrested for disorderly conduct.

Mathre, by his on admission, "dropped his pants" and exposed his posterior to Minot Police Officers Effertz and Redding----Conduct that is commonly referred to as "mooning"---While the officers were in the process of investigating a complaint involving Mathre. Mathre believes "mooning" a police

officer was a legitimate and legal means of expression. He said it was a "mild" political act and a protest against government authority protected under the implied freedoms of the constitution.

While the term "mooning" has no statutory definition in this state, and no definition can be found in the case law, the dictionary definition is: "to expose ones buttocks in public as a prank or disrespectful gesture." American Heritage Dictionary of the English Language, 4th Edition (2000). This is the conduct, which formed the basis for the DISORDERLY CONDUCT charge against Mathre.

Mathre maintains that he cannot be convicted of this offense because "mooning " is not an obscene gesture. In support of this contention, Mathre points out that the terms "obscene" and gesture" are nowhere defined in the Code of Ordinances for the City of Minot.

The State's Disorderly Conduct statute (N.D.C.C. 12.1-31-01) states, in pertinent part, as follows:

A person is guilty of a class B misdemeanor if, with intent to harass, annoy, or

alarm another person or in reckless disregard of the fact that another person is harassed, annoyed, or alarmed by the individual's behavior, the individual:

c. In a public place, uses abusive or obscene language, knowingly exposes that

individual's penis, vulva, or anus, or makes an obscene gesture. (Emphasis added- language inserted in the statute by the 2001 Legislature).

1. This section does not apply to constitutionally protected activity.

N.D.C.C.121-01-05 clearly indicates that no crime defined by state law may be superseded by city ordinance. That statute reads as follows: No offense defined in this title or elsewhere by law shall be superseded by any city or county ordinance, or city or county home rule charter, or by an ordinance adopted pursuant to such a charter, and all such offense definitions shall have full force and effect within the territorial limits and other jurisdiction of home rule cities or counties. This section shall not preclude any city or county from enacting any ordinance containing penal language when otherwise authorized to do so by law.

As things presently stand, the City of Minot has not acted to amend its DISORDERLY CONDUCT ordinance so as to conform with state law (as amended in 2001) In order for the court to find Mathre guilty of this offense, the Court would have to find that "mooning" is an obscene gesture as that term is used in the ordinance in question. While there is no question that what Mathre did in this instance was disrespectful toward the officers, the terms "obscene" and "gesture" are nowhere defined in the Code of Ordinances for the city of Minot-----and the Court finds that an appropriate basis does not exist to make a finding that "mooning" is an obscene gesture.

The Court further observed that the absence, in the City of Minot's' DISORDERLY CONDUCT ordinance, of the language "knowingly exposes that individual's penis, vulva, or anus," appears to permit an individual to engage in conduct within the city of Minot which is expressly prohibited by state law.

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This runs afoul of N.D.C.C.121-01-05, and, accordingly, the Court concludes that Section 23-16(3) of Minot City Ordinance No.2455 ss 5, is void and unenforceable-----as applied to Mathre under the facts of this case. Mathre is "not guilty " of the offense of Disorderly Conduct.

According to N.D.C.C. 12.1-31-01. Disorderly conduct specifically states exposure of the penis, vulva or anus. Minot Law enforcement Officers stated under oath that Mathres' anus and penis were not exposed.

"`The forbidden act must come clearly within the prohibition of the statute, for the scope of a penal statute will not ordinarily be enlarged by construction to take in offenses not clearly described; and any doubt on this point will be resolved in favor of the defendant' (Citing State v. Heath, 199 N.C. 135, 153 S.E. 855, 87 A.L.R. 37.)

Under this Court's directives on statutory construction, "words are given their plain, ordinary and commonly understood meaning" and ambiguous criminal statutes are construed "against the government and in favor of the accused". Heck v. Reed, 529 N.W.2d 155, 160 (N.D. 1995); State v. Brossart, 1997 ND 119 14, 565 N.W.2d 752, 756 (N.D. 1997).

Although the Honorable William Mclees acquitted Mathre, it was under the premise that the Minot City Ordinance was more vague than the North Dakota Statute under N.D.C.C.12.1-31-01. for Disorderly conduct. Mathre initially argued that he has a constitutional right to state or show his disrespect for the Minot Police departments presence in the absence of any other criminal activity and mooning by statute is not a criminal activity.

Also accordingly case precedence is found in Fly v, State of North Carolina. This is the case referred to by Mathre prior to his arrest for disorderly conduct.

(see attachment)

"The majority of states which have reviewed this issue agree they include only genitalia"

Public defender Julie Lewis, arguing before the North Carolina Supreme Court that "mooning" is not illegal because buttocks do not constitute "private parts" under state law.

Our freedom of speech, protected by the first Amendment in the Bill of Rights, is one of our most basic constitutional rights. Yet the precise nature of what is protected by the First Amendment is often misunderstood. The word speech in the First Amendment has been extended to a generous sense of "expression" -- verbal, non-verbal, visual, symbolic.

At the recent Ku Klux Klan rally at the Texas State Capitol a hundred Austinites dropped their pants and royally mooned the Grand Wizard and his minions. By the time 35 young Klansmen and women arrived at the Capitol in armored busses, many potential mooners had gathered, buoyed by Travis County Sheriff Terry Keel who had declared mooning legal, with a little discretion in the explicit exposure department.

As far as constitutionally protected first amendment rights, I can find no case law, but can only find that it is legally acceptable for anti-Klansmen to show disrespect by "mooning" the Ku Klux Klan, liberals to moon President Bush

as well as the White house, environmentalists to moon lumber companies, and protesters to moon Amtrak trains. I offer the following for evidence.

In Miller v. California (413 U.S. 14 [1973]) the U.S. Supreme Court established a three-pronged test for obscenity prohibitions, which would not violate the First Amendment:

(a) Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Also testimony heard showed that the disrespect was shown towards the Minot Police department only, and that the one civilian who saw the incident "the mooning" was not harassed, annoyed, or alarmed by the Defendant's behavior. The only ones who were affected by the incident were the law enforcement officers, who according to City of Bismarck v. Schoppert are held to higher degrees of accountability, as opinioned by Justice Levine , Opinion deleted for lack of space. See enclosed Attachment. The trial court dismissed and the City appealed. Bismarck v. Schoppert, 450 N.W.2d 757 (N.D. 1990). (Schoppert I) Based on Bismarck v. Nassif, 449 N.W.2d 789 (N.D. 1989), we reversed. 450 N.W.2d at 758. In Nassif, the defendant argued that Bismarck Ordinance 6-05-01(3) conflicted with 12.1-01-05, NDCC, because the ordinance prohibited conduct different from the statute. We concluded there was no conflict between the

ordinance and the statute because the additional language in the ordinance simply "clarifies the particular language which it prohibits. It literally expresses what the state statute must be construed to include to be constitutional..... Without weighing the evidence and while viewing it in a light most favorable to the verdict, we hold it was insufficient to sustain the conviction of Schoppert. Under these circumstances, Schoppert cannot be retried. Burks v. United States, 437 U.S. 1 (1978). Accordingly, we reverse and remand to the trial court with instructions to vacate the judgment and enter judgment of acquittal. It is obvious that the Defendant was not acting unlawfully. Also after informing the law enforcement officers of Flye v. North Carolina, and of the constitutionality of the right to show disrespect, They no longer were acting in good faith or under color of the law and that they were not incited to a breach of the peace but by the undisputed evidence which reveals that the defendant's first remark while "mooning" was made while they were in their police cars.

Under the belief of Flye v North Carolina and the knowledge held of N.D.C.C. 12.1-31-01 there was no probable cause for the arrest.

That the Law enforcement officers were not incited to a breach of the peace by the undisputed evidence which reveals that the defendant's first action was made while they remained in their cars. Insofar as the further actions made by Officers Effertz and Redding as they approached and apprehended the Defendant, their actions could be characterized as provoking the defendant.

Again Mathre, according to both the defenses and the states witnesses was

never on the private property and according to Prosecutions witness Kim Potter, the responsible party for transitional housing, stated that neither she nor anyone from her agency had personally "warned" Mathre to not be there. Again they presumed they could warn Mathre not to be on public property, and that they could intercede in his assisting to move his grandmother. And according to their (Effertz and Reddings) testimony they were there to remove Mathre. And again, according to direct testimony on rebuttal, Officer Effertz first words stated to Mathre were "Shane, you were warned not to be here!" Not statements pertaining to any disorderly conduct. Only after being told that Mathre had not broken any laws was Mathre arrested for disorderly conduct.

The trial court gave the jury the following instructions to guide their deliberation in determining if Mathre lacked criminal responsibility for the offenses charged:

On or about January 31, 2003 the above named Defendant, committed the offense of: Count 3: N.D.C.C. 12.1-08-02 Preventing arrest or discharge of other duties.

Mathre with intent to prevent a public servant from effecting any other official duty, created a substantial risk of bodily injury to the public servant, to-wit, Mathre with intent to prevent officers of the Minot Police Department from discharging their official duties,

created a substantial risk of bodily injury to the police officers. Said offense is a Class A Misdemeanor.

Count 1: N.D.C.C. 12.1-17-01 Assault on a peace officer

Mathre willfully caused bodily injury to another human being, to wit, Mathre willfully hit a City of Minot Police officer Corwin Effertz causing bodily injury, at a time when he knew that Effertz was a law enforcement officer acting in his official capacity. Said offense is a class C felony.

Count 2: N.D.C.C. 12.1-17-01 Assault on a peace officer

Mathre willfully caused bodily injury to another human being, to wit, Mathre willfully hit a City of Minot Police officer Scott Redding causing bodily injury, at a time when he knew that Effertz was a law enforcement officer acting in his official capacity. Said offense is a class C felony.

Count 4: N.D.C.C. 12.1-08-06 Escape

Mathre without lawful authority, removed or attempted to remove himself from official detention, using force to effect his removal, to-wit, Mathre without lawful authority, removed himself or attempted to remove himself from official detention using force to effect his removal. Said offense is a class C felony.

There is no listing for legal and legitimate defenses for the Jury to weigh in light of the evidence and testimony. There is no record of Mathre objecting to the aforementioned instructions.

Following in pertinent part are the defenses, all of which were testified to in the Jury trial.

N.D.C.C.12.1-08-02. Preventing arrest or discharge of other duties.

1. *A person is guilty of a class A misdemeanor if, with intent to prevent a*

public servant from effecting an arrest of himself or another for a misdemeanor or infraction,

2. It is a defense to a prosecution under this section that the public servant was not acting lawfully,. .....in good faith and under color of law.

In order to sustain a conviction of preventing the arrest or discharge of other duties the Prosecution must prove beyond a reasonable doubt that the public servant, in this case Minot City police officers were acting lawfully. That cannot be done if the defendant is arrested in the absence of criminal activity. Mathre was not allowed to use the fact in District court that he did not break the law under N.D.C.C. 12.1-31-01, or Section 23-16 of Minot City Ordinance No. 2455ss5 as a defense. Clearly being arrested for something not illegal is not under color of the law. Preventing arrest in the absence of criminal activity is allowable, especially against overly aggressive law enforcement. And according to N.D.C.C. 12.1-31-01 it is a defense to a prosecution under this section that the public servant was not acting lawfully,. .....in good faith and under color of law.

At common law an individual had the right to resist an unlawful arrest. This right to resist was based, in large part, on the perception that some unlawful arrests were so provocative that a person, either the subject of the arrest or an onlooker, might react to the attempted arrest without carefully contemplating the consequences of their actions, and that an individual was justified in resisting, by force if necessary, an illegal interference with his liberty.

Virtually all American courts adopted the English common law right to resist arrest, although the justification for the right to resist changed slightly, to one based on principles of self-defense. In general, American courts in the eighteenth and early twentieth century allowed the use of whatever force was "absolutely necessary to repel the assault constituting the attempt to arrest." The only major restriction on the right was that an arrest made pursuant to a warrant that was later determined to be technically defective could not be resisted by force.

The right has been abrogated by judicial decree as well as legislative enactment. Elimination of the right is based on several factors, including the development of modern criminal procedure, the ability of criminal defendants to seek redress via other means, and the improvement of jail conditions. Several state courts have recently eliminated the right to resist arrest, despite acknowledging the flagrant illegality and provocative actions of the police in the case at hand. In the rush to eliminate a right perceived as against contemporary public policy, the courts have paid little attention to the original justification for the rule--that an illegal arrest is an affront to the dignity and sense of justice of the arrestee--and instead have focused on the alternatives to forcible resistance that have been developed, such as civil suits and the writ of habeas corpus.

North Dakota is one of the States that still permit a person to resist an unlawful arrest.The United States Supreme Court has only infrequently addressed the right to resist arrest, declaring in dicta in one case that "[o]ne has an

undoubted right to resist an unlawful arrest," but failing to provide a basis for this assertion. In another case the Court implicitly adopted the common law provocation rationale for permitting the defense of resisting an unlawful arrest.

In John Bad Elk v. United States, the defendant, an Indian policeman at the Pine Ridge Indian Reservation in South Dakota was convicted of murder after shooting a fellow Indian policeman who had come, with two others, to arrest him. The three Indian policemen had received verbal orders from a Captain Gleason to bring Mr. Bad Elk to the Indian reservation office to answer some questions about an incident in which Mr. Bad Elk had been firing his gun into the air. There was no arrest warrant or evidence that Mr. Bad Elk had committed a criminal violation. When confronted at his home by the three Indian policemen, Mr. Bad Elk refused to accompany them to the office at that time, instead saying it was too late and that he would go with them in the morning. There was some dispute as to precisely what happened next, but Mr. Bad Elk fired his rifle at the three police officers. He shot and killed one John Kills Back. Bad Elk was subsequently charged with murder. No evidence of a warrant for his arrest or that he had in fact committed an arrestable offense prior to the shooting of John Kills Back was ever produced.

At trial Bad Elk's counsel requested a jury instruction that reflected the common law right to resist an unlawful arrest. The trial judge refused to give such an instruction, and instead instructed the jury that the three police officers had the right to arrest Mr. Bad Elk and that he could use force only to

protect himself from force being used beyond what was necessary to make the arrest Bad Elk was convicted of murder and sentenced to death. The United States Supreme Court took the appeal, and reversed the lower court. In so doing, the Court, in a unanimous opinion per Justice Peckham, determined that the jury instruction given by the trial judge, which indicated the police officers had a right to arrest Bad Elk and that he had no right to resist an arrest, was erroneous. Said the Court:

> "At common law, if a party resisted arrest by an officer without warrant, and who had no right to arrest him, and if in the course of that resistance the officer was killed, the offence of the party resisting arrest would be reduced from what would have been murder, if the officer had the right to arrest, to manslaughter . . . [I]f the officer have no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest."

This is a clear endorsement of the common law rule that an illegal arrest may be resisted, and that if the resistance results in the death of the police officer, the provocation inherent in the illegal arrest attempt reduces the charge from murder to manslaughter. The Court did not offer a rationale for this rule, but merely indicated that such a right was firmly established.

In a subsequent case, United States v. Di Re, the Supreme Court again endorsed the right to resist an unlawful arrest, albeit doing so in dicta. Di Re involved a prosecution for unlawfully possessing ration coupons during World War II. At issue was whether the police in this case possessed the requisite

probable cause to arrest the defendant. When the police seized the defendant, he did not object to being arrested. At trial and on appeal the prosecution argued that the defendant's failure to protest could be used to create probable cause, on the theory that an innocent man would have objected to, or resisted, his arrest.

The Court decided the case on other grounds, but made reference to the common law right to resist an illegal arrest if one so chooses, stating: "One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases."

Evidence has been presented that Mathre acted in self –defense. The State must prove, beyond a reasonable doubt, as an additional element of each of the offenses charged, that Mathre was not acting in self-defense. Mathre does not have the burden of proof as to this defense. If the state has failed to prove beyond a reasonable doubt that Mathre did not act in self-defense, Mathre is entitled to a verdict of not guilty.

N.D.C.C.12.1-05-03. Self-defense. Reads, in pertinent part,

A person is justified in using force upon another person to defend himself against danger of imminent unlawful bodily injury,..... or detention....., except that:

1. A person is not justified in using force for the purpose of resisting arrest, ...by a public servant under color of law, but excessive force may be resisted.

Testimony was heard by three witnesses that excessive force was used by Law enforcement on the scene initially. A fourth witness an 85 year old gentleman

could only say it was police brutality.

12.1-05-07. Limits on the use of force - Excessive force - Deadly force.

d. When used by a public servant authorized to effect arrests or prevent escapes,

if such force is necessary to effect an arrest or to prevent the escape from custody of a person who has committed or attempted to commit a felony involving violence, or is attempting to escape by the use of a deadly weapon, or has otherwise indicated that he is likely to endanger human life or to inflict serious bodily injury unless apprehended without delay.

The Jury ignored any and all evidence of the act of self-defense.

N.D.C.C.12.1-05-06. Use of force in defense of premises and property, Reads, in pertinent part,

Force is justified if it is used to prevent .....an unlawful .....damaging of property, if the person using such force first requests the person against whom such force is to be used to desist from his interference with ... or property.

Law enforcement and witnesses stated that Mathres' cell phone was laying on the ground. Mathre asked the law enforcement officers to quit stepping on it. Law enforcement themselves state that "something was said about a cell phone at the scene, but they ignored Mathres' requests to not damage his property.

N.D.C.C.12.1-08-06. Escape, Reads, in pertinent part,

1. *A person is guilty of escape if, without lawful authority, the person removes or*

attempts to remove himself from official detention.. ....

a. The actor uses any other force or threat of force against another in effecting or attempting to effect the actor's removal from official detention; or

b. The person escaping was in official detention by virtue of the person's arrest for, or on charge of, a felony, ... Otherwise escape is a class A misdemeanor.

b. "Official detention" means arrest, ...

4. Irregularity in bringing about or maintaining detention, ...shall be an affirmative defense if:

b. The detaining authority did not act in ***good faith under color of law****.*

If not for an unlawful arrest, at any point in the incident there would be no escape. When Helen Hancock collapsed, Mathre proclaimed that he was an EMT and a Nurse. Testimony by the defense stated he proclaimed this and rushed to Mrs. Hancock's side. Mrs. Hancock is a 77-year-old female with a significant heart condition. And Mathre is a licensed Nurse in two states, an 18-year nationally registered EMT with an ambulance service in his community. He is also a 10-year paramedic, has been a Medical Service specialist for the U.S. Air Force and has worked in an Emergency Medical capacity his entire adult life. He has also saved the lives of several people around several states and in many communities.

In order to sustain a conviction of Escape, the Defense must prove beyond

a reasonable doubt that the public servant, in this case Minot City police officers were acting unlawfully. That can be done if the defendant is arrested in the absence of criminal activity. Mathre was not allowed to use the fact in District court that he did not break the law under N.D.C.C. 12.1-31-01, or Section 23-16 of Minot City Ordinance No. 2455ss5 as a defense. Clearly being arrested for something not illegal is not under color of the law. Preventing arrest in the absence of criminal activity is allowable. It is a defense to a prosecution under this section that the public servant was not acting lawfully. The detaining authority did not act in good faith under color of law.

N.D.C.C.12.1-17-01. Simple assault.

A person is guilty of an offense if that person:

Willfully causes bodily injury to another human being

The offense is:

A class C felony when the victim is a peace officer or correctional institution employee acting in an official capacity, which the actor knows to be a fact, a person engaged in a judicial proceeding, or a member of a municipal or volunteer fire department or emergency medical services personnel unit or emergency department worker in the performance of the member's duties.

Mathre is entitled to self defense, even against law enforcement officers. Mathre defended his property and person from excessive force, and under duress went to the aid of his grandmother, as a nurse and EMT. Law enforcement hindered this attempt by their own illegal actions. Any injuries sustained by said law enforcement were by their own illegal activities. No physical evidence was

exhibited or entered for purpose of evidence. Only testimony by law enforcement stated that Effertz had a sore leg and Redding sustained a bruise to the face from an elbow.

N.D.C.C.12.1-05-10. Duress.

1. *In a prosecution for any offense, it is an affirmative defense that the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or to another.*

N.D.C.C.12.1-05-05. Reads, in pertinent part,

Use of force by persons with parental, custodial, or similar responsibilities.

4. A duly licensed physician, or a person acting at a duly licensed physician's direction,

may use force in order to administer a recognized form of treatment to promote the

physical or mental health of a patient if the treatment is administered:

a. In an emergency:

5. A person may use force upon another person, ...to prevent the death or serious bodily injury of such other person.

The escape was made to assist an unresponsive elderly person with a significant cardiac history. When Helen Hancock collapsed, Mathre proclaimed that he was an EMT and a ACLS certified Nurse. Testimony by the defense stated he proclaimed this and rushed to Mrs. Hancock's side. Mrs. Hancock is a 77-year-old female with a significant heart condition. And Mathre is a licensed Nurse in two states, an 18-year nationally registered EMT with an ambulance service in his

community. He is also a 10-year paramedic, has been a Medical Service specialist for the U.S. Air Force and has worked in an Emergency Medical capacity his entire adult life. He has also saved the lives of several people around several states and in many communities.

Mathre asked for the following to be allowed as defenses for the charges, the request was denied.

N.D.C.C.12.1-05-08. Excuse. Reads, as is pertinent,

A person's conduct is excused if he believes that the facts are such that his conduct is necessary and appropriate for any of the purposes which would establish a justification or excuse under this chapter, even though his belief is mistaken..... Excuse under this section is a defense or affirmative defense according to which type of defense would be established had the facts been as the person believed them to be.

Having asserted the defense lack of criminal responsibility, the burden rests upon Mathre to prove it by the greater weight of the evidence. Evidence is of greater weight if, when considered and compared with opposing evidence, it is more persuasive and convinces you that what Mathre seeks to prove is more likely so than not so. It is immaterial who produced the persuasive evidence.

Accordingly, although the State may have proved beyond a reasonable doubt all of the essential elements of the offense charged, Mathre cannot be found guilty if Mathre has proved this affirmative defense by the greater weight of the evidence. In that event, you must find Mathre not guilty.

N.D.C.C.12.1-05-09. Mistake of law, Reads, in pertinent part,

Except as otherwise expressly provided, a person's good faith belief that conduct does not constitute a crime is an affirmative defense if he acted in reasonable reliance upon a statement of the law contained in:

1. A statute or other enactment.

2. A judicial decision, opinion, order, or judgment.

4. An official interpretation of the public servant or body charged by law with responsibility for the interpretation, administration, or enforcement of the law defining the crime.

Mathre believed/believes per above statuettes and legal findings that he did not commit a crime and was defending himself, that belief and knowledge gave basis for the defense of Mistake of Law.

OBVIOUSE ERROR

First, in regard to statutory law, N.D.C.C. § 12.1-01-03, Proof and Presumptions, states in relevant part:

1. No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. ... "Element of the offense means: ...

e. The nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue. ...

3. Subsection 1 does not apply to any defense which is explicitly designated an "affirmative defense". An affirmative defense must be proved by Mathre by preponderance of evidence. (Emphasis added.) Furthermore, considering that this Court has ruled that "our statutes designate self-defense as a 'defense' and not

an 'affirmative defense'", lack of criminal responsibility cannot precedentially be construed as an affirmative defense. **State v. Olander**, 1998 ND 50 20,575 N.W.2d 658, 664 (1998)(reversing defendant's conviction due to trial court's instruction classifying self-defense as an affirmative defense). Because although the self-defense standard is contained in Chapter 12.1-05, titled "Justification-Excuse-Affirmative Defenses", it is still construed as a "defense", while the standard for lack of Duress is not even contained in said chapter, whose title purports to list the affirmative defenses available under North Dakota law.

Thus, under both North Dakota statutory and case law, lack of criminal responsibility is not an affirmative defense. Accordingly, per this Court's directive, the inquiry now turns to whether the trial court's instruction classifying lack of Duress as an affirmative defense constituted "obvious error".

There is no record of Mathres pro se counsel objecting to the trial court's jury instructions which classified Duress as an affirmative defense. Even though this error was not brought to the attention of the trial court or for that matter brought to the attention of this Court in the undersigned's initial brief, this Court may notice this error pursuant to N.D.R.Crim.P. 52(b), which states, "obvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

"Before an appellate court may notice a claimed error that was not brought to the attention of the trial court, (this Court) requires (1) error, (2) that is

plain, and (3) affects substantial rights". **State v. Olander**, 575 N.W.2d 658, 663, 1998 ND 50 14 (citing United **States v. Olano**, 507 U.S. 725, 113 S.Ct. 177, 123 L.Ed.2d 508 (1993) as precedent). As argued above, the trial court's instruction classifying lack of criminal responsibility as an affirmative defense was an "error". This "error" was "plain" for the purposes of this inquiry because, as argued above, it constituted "a clear deviation from the applicable legal rule under current law". **See id.** (setting the standard for what constitutes "plain error" for the purposes of this inquiry).

Thus, the question that remains is whether trial court's classification of duress as an affirmative offense affected Mathres "substantial rights", or as otherwise stated, was "prejudicial or affected the outcome of the proceedings". Id. (setting the standard for what constitutes "affecting substantial rights" for the purposes of this inquiry).

This Court has held that errors in jury instructions, not brought to the attention of the trial court, which incorrectly classified a "defense" as an "affirmative defense" and placed the burden of proof upon Mathre, affected the "substantial rights" of said defendants and should be construed as "obvious errors" under Rule 52(b), thus allowing appellate courts to notice these errors. State v. Olander, 575 N.W.2d 658 (reversing defendant's conviction due to trial court's jury instruction classifying self-defense as an affirmative defense); See State v. Trieb, 315 N.W.2d 649 (reversing defendant's conviction due to trial court's jury instruction which erroneously included a presumption that unlawful acts are done with an unlawful intent). Said precedent further

indicates that appellate courts "should" notice these types of errors. Id. As stated by the court in Olander, an appellate court "should correct (an obvious error) if it 'seriously affects the fairness, integrity or public reputation of judicial proceedings'". 575 N.W.2d at 663 (quoting **United States v. Olano**, 507 U.S. 725, 736).

The court in Olander goes on to state that "due process protects an accused from conviction except upon proof beyond a reasonable doubt of every element of the offense" and that the absence of a defense, such as lack of criminal responsibility, constitutes an element of the offense. **Id**. at 664.

Although the court in Olander states that "a trial court's failure to give (the correct) burden of proof instruction for self-defense is not per se reversible error", it then states that "the determinative factor in obvious error-analysis is whether the remaining instructions, as a whole, informed the jury about State's burden of proof", thus, implying that if the instructions, as a whole, do not properly set out the burden of proof for a defense, such as lack of criminal responsibility, said instructions constitute per se reversible error. See **id**. at 665. The instructions given to the jury relative to Mathres defense of Self defense and duress, taken as a whole, incorrectly place the burden of proof upon Mathre. Accordingly, these instructions should be construed as per se reversible error under North Dakota law. See id.

For the aforementioned reasons, the trial court's instructions to the jury which placed the burden of proof on Defendant's Duress defense upon Mathres constitute "obvious error" which should noticed by this Court under Rule 52(b).

FACTS BEFORE THE COURT

1. Mathre was legally on a public street and public sidewalk attempting to help move his grandmother to his home.

2. Mathre mooned law enforcement upon their arrival to show disrespect for the law enforcement officers.

3. Mathre then went about his business of moving boxes and furniture into the mini-van and u-hall trailer and had disappeared from site.

4. Officers Redding and Effertz left the police cars with Effertz circling west and Redding circling from the East.

5. Officer Redding came around the minivan and asked Mathre "how 's it going

6. Mathre responded fine.

7. Officer Effertz came around the west side back of the trailer and stated "Shane you were warned not to be here"

8. Officer Redding grabbed Mathre by the trailer next to the mini-van in an attempt to apprehend him and slammed him into the trailer.

9. Mathre and others present came to Mathres defense that he was on the public street and sidewalk and had not entered at any time the private property owned by the SS.

10. At this Officer Effertz changed his mind and stated that Mathre was still under arrest.

11. When Mathre asked why he was being arrested and was informed by Effertz "for

that mooning thing".

12. Mathre then stepped back and informed of Officer Effertz that mooning was not illegal in North Dakota and the supreme Court of North Carolina had upheld its legality and that it is a freedom of speech and expression under the first amendment of the constitution.

13. Officer Effertz stated that this is not North Carolina and that Mathre was still under arrest.

14. Officer Effertz and officer Redding then slammed Mathre into the trailer dislodging his cell phone.

15. Mathre asked the officers to quit stepping on his phone as they slammed him into the trailer repeatedly.

16. Mathre pushed himself back and away from the trailer to insure the safety of his property.

17. Officer Effertz and Redding then proceeded to use wrestling moves and other moves to restrain Mathre.

18. Mathre heard someone yell from the curb and looked to see his grandmother collapse.

19. Mathre yelled "I'm a nurse and an EMT". And tossed the law enforcement officers to the side. Using whatever force was needed to break free.

20. Mathre ran to his grandmother.

21. Mathre was then tackled and restrained and apprehended on the ground next to his unresponsive grandmother.

22. Mathre continued to yell he was a Nurse and an EMT.

23. Officer Effertz stated "I don't care."

24. Mathre then fought to get the law enforcement officers off of him and to get to his grandmother.

25. Officer Redding got his mace out but did not use it.

26. Officer Redding then called for an ambulance for the unconscious and unresponsive elderly lady.

27. Once the ambulance had been dispatched, Mathre became subdued.

28. That witnesses for the defense stated that Officers Effertz and Redding repeatedly slammed Mathre into the mini-van and trailer.

29. Witnesses for the defense stated that Mathre did not strike, kick, hit, or attack the Law enforcement officers.

30. One witness for the Prosecution stated she saw Mathre kick at one officer, but not when this occurred.

Based upon such evidence, it was in error for the court to determine beyond reasonable doubt that Mathre was not protecting his personal property and protecting himself from excessive force, That no arrest was legally ascertained and that any injuries sustained by law enforcement occurred while performing an unwarranted arrest, for which there is defense for and which was submitted to the court. Mathres actions were actions of self defense of property, person and others. This is evident with the collapse of Mathres grandmother, whom Mathre used what ever force was needed to go to her aid.

SUMMARRY

Mathre was denied the legal defense of a wrongful, unwarranted arrest as well as other pertinent defenses. The Jury instructions failed to list what the defenses

for the charges were, and that they were legitimate defenses, thusly not giving the jury the opportunity to hear that Mathres defenses were legitimate defenses to the crimes for which he was charged. Based upon such evidence, Mathres' acts were of an innocent man protecting himself from wrongful and illegal arrest and abuse at the hands of law enforcement, the protection of his person and property, and an attempt to go to the aid of a fallen family member, It was in error for the court to determine beyond reasonable doubt that Mathre behavior supported any criminal conviction.

CONCLUSION:

WHEREFORE, Defendant/Appellant, while maintaining the prayers for relief contained in this brief, also prays that the judgments of conviction against him be reversed and that the charges that he was convicted of, based upon the reasons set forth above, respectfully requests that the underlying convictions of Assaulting a police officer(2 counts), resisting arrest, and escape be reversed.

Dated this 28th day of November, 2003

Larry Shane Mathre

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